

Oct 2

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Service Rules for the 746-764 and)
776-794 MHz Bands, and Revisions of)
Part 27 of the Commission's Rules)

WT Docket No. 99-168

To: The Commission

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF THE
INDUSTRIAL TELECOMMUNICATIONS ASSOCIATION, INC.

1. The Industrial Telecommunications Association, Inc. (ITA), pursuant to the Federal Communications Commission's *Notice of Proposed Rule Making* in the above-referenced matter hereby respectfully submits these comments responsive to the Commission's proposals.¹

I. Statement Of Interest

2. ITA is a Commission-certified frequency advisory committee and coordinates in excess of 6,000 applications per year on behalf of applicants seeking Commission authority to operate business and industrial/land transportation radio stations on frequency assignments allocated between 30-900 MHz.

3. ITA enjoys the support of a membership that includes more than 3,500 licensed two-way land mobile radio communications users, private mobile radio service (PMRS) oriented radio dealer organizations, and the following trade associations:

Alliance of Motion Picture and Television Producers
Aeronautical Radio, Inc.

¹ In the Matter of Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *Notice of Proposed Rule Making*, FCC 99-97, released June 3, 1999 (*Notice*).

Associated Builders & Contractors, Inc.
Florida Citrus Processors Association
Florida Fruit & Vegetable Association
National Mining Congress
National Propane Gas Association
National Ready-Mixed Concrete Association
National Utility Contractors Association
New England Fuel Institute
United States Telephone Association

In addition, ITA is affiliated with the following independent market councils: the Council of Independent Communications Suppliers (CICS), the Taxicab & Livery Communications Council (TLCC), the Telephone Maintenance Frequency Advisory Committee (TELFAC), and USMSS, Inc.

II. Introduction

4. In this proceeding, the Commission proposes to establish new service rules for the licensing of the 746-764 and 776-794 MHz bands (hereinafter referred to as the "746-806 MHz bands") under Part 27 of the rules. This proposal is in response to the Congressional directives contained in the Balanced Budget Act of 1997 (Budget Act).²

5. The Budget Act requires that the Commission assign 36 MHz of spectrum in the 746-806 MHz band for "commercial use" and commence the competitive bidding process for these commercial licenses after January 1, 2001.³ While Congress in the Conference Report

² See Section 337 of the Communications Act, 47 U.S.C. § 337, as added by § 3004 of the Balanced Budget Act of 1997, Pub.L.No. 105-33, 111 Stat. 251 (1997).

³ Recently, in an attempt to "find" funds to cover defense expenditures, the Senate passed S.1122 which proposes to accelerate the planned auction of the 36 megahertz of spectrum at 746-806 MHz. Under this proposal, the spectrum at 746-806 MHz had been "scored" by the Office of Management and Budget at \$2.6 billion dollars and the auction proceeds would be deposited in the U.S. Treasury no later than October of 2000. While this particular proposal has not been signed into law, it is particularly troubling as it proposes to accelerate the auction of this spectrum before the Commission has had the

accompanying the Budget Act, also directed the Commission to "consider the need to allocate spectrum for shared or exclusive use by private wireless services in a timely manner,"⁴ the Congressional condition that this particular spectrum be for "commercial use" and that it be awarded via competitive bidding leaves no room for alternative spectrum management policy.

6. From ITA's perspective, the Commission has been afforded little, if any, management discretion with respect to the spectrum under consideration. The conditions placed on the type of use, the licensing mechanism to be used, the proposed accelerated deadline for the auction, and the expected \$2.4 billion in budgeted revenue by Congress commandeers the Commission's spectrum policy and planning authority. While the private wireless community would most definitely benefit from the spectrum to be made available in the 746-806 MHz band (as suggested by the Land Mobile Communications Council (LMCC) in its petition for rule making and subsequent supplemental comments⁵), Congress has dictated that this spectrum be used for services that are compatible with competitive bidding. Simply stated, competitive bidding is an inappropriate licensing tool in an environment where spectrum is allocated using engineering solutions and the spectrum is shared in a geographical area by multiple users -- *i.e.*, the private wireless community.

7. ITA understands the pressures facing the Commission in this proceeding. The Commission's task would certainly be easier if it were permitted to give full consideration to the

opportunity to determine how best to allocate the use of this spectrum.

⁴ H.Rept. 105-217 at 575 (1997).

⁵ See In the Matter of An Allocation of Spectrum for the Private Mobile Radio Services, Petition for Rule Making Submitted by the Land Mobile Communications Council, RM-9267, filed April 22, 1998 (LMCC Petition); see also LMCC Supplemental Comments in RM-9267, filed April 20, 1999.

spectrum needs of all radio services as well as the discretion to use the traditional public interest standard. Instead, political forces appear to be asking the Commission to favor U.S. budgetary needs at the expense of sound spectrum management. In the past, this has proven to be a recipe for disaster both in terms of revenue generation and communications services to the public. Notwithstanding the potential accelerated time frame for this proceeding, the Commission must find a way to focus upon and promote rational spectrum policies that fully considers the direct spectrum needs of the private wireless community.

III. Comments

A. Service Rules.

8. The Commission seeks comment on the type of services that should be permitted in the 746-806 MHz bands. Absent budget policy dictating spectrum management policy, the Commission would have ample opportunity to make a deliberate and enlightened decision as to what types of services could and should be permitted in the 746-806 MHz bands. In an ideal world, the Commission would give consideration to the spectrum requirements of all radio services, including both commercial and non-commercial industries, and would include in its deliberations the request by the LMCC for additional spectrum for the private wireless community. Unfortunately, Congress has dictated that this spectrum be used for "commercial" purposes. Adding to that burden is the restricted use of the band, a possible acceleration of the auction schedule, and an unrealistic revenue expectation. Given these circumstances, the Commission has no alternative but to argue that it should adopt flexible service rules for the 746-806 MHz bands. In fact, in this proceeding the Commission has tentatively concluded that:

making spectrum available for flexible commercial use under our Part 27 Rules is in the public interest because it will contribute to technological service innovation, the creation of new jobs for the American workforce, the fostering of national economic growth, and the enhancement of opportunities for all Americans to utilize, and realize the benefits of, the national telecommunications infrastructure.⁶

9. We do not agree with this conclusion. There is no empirical evidence that maximizing flexibility within service rules best serve the public interest and promote competition in the marketplace. Instead, it is ITA's opinion that too much flexibility only promotes uncertainty in the marketplace.

10. Excessive flexibility also increases the cost of equipment. As a practical matter, the more definition given to a radio service, the greater the opportunity for the manufacturer to provide efficient and cost-effective products to the licensees. Under the Commission's proposal, the services offered in the 746-806 MHz band will be defined in broad and generic terms. As a result, the manufacturers will be unable to anticipate the nature of the service to be offered and utilize cost-saving designs. Realistically, too much flexibility promotes higher equipment costs and longer production times.

B. Interference Avoidance/Shared Use with Broadcasters.

11. The Commission also seeks comment on whether the potential sharing of this spectrum between broadcast services and fixed and mobile wireless services will inhibit investment in the 746-806 MHz band. Section 303(y)(2)(B) of the Communications Act of 1934, as amended, requires that flexible use of the spectrum "not deter investment in communications services and

⁶ Notice at ¶ 12.

systems, or technology development . . ."⁷ Flexible service rules coupled with the need to protect incumbent broadcasters will absolutely negatively impact potential investment in these bands in certain parts of the country and will make spectrum sharing extremely difficult, if not impossible in many areas of the country. Under the Commission's proposed flexible service approach, this result cannot be avoided.

12. The land mobile community currently shares spectrum with the broadcasters in the 470-512 MHz bands -- subject to certain restrictions. These restrictions have worked well, but are based on interference protection criteria that were established in Docket 18261 over 25 years ago. While shared use between broadcasters and land mobile licensees works reasonably well, shared use between broadcasters and traditional commercial providers would be more problematic. Land mobile licensees, unlike traditional commercial providers, offer "localized" or "campus-like" services and only need a limited operating area. Traditional commercial providers, on the other hand, offer wide-area geographic services to large segments of the public and function within extended operating areas. The current shared use restrictions between broadcasters and land mobile licensees would not work if traditional commercial providers were to be included in this allocation as traditional commercial providers need uninterrupted coverage throughout their operating area and cannot easily modify their systems to avoid causing interference to broadcasters operating in the same area. Since Congress has mandated that this spectrum be used for "commercial" purposes, it is reasonable to believe that traditional commercial providers will receive an allocation of at least some portion of the 746-806 MHz band. Thus, it is ITA's belief

⁷ 47 U.S.C. § 303(y)(2)(B).

that the Commission should reconsider the proposed shared use of this spectrum with broadcasters and should instead consider a more traditional, service specific allocation.

13. For the broadcast incumbents currently operating in the 746-806 MHz band, the Commission must develop procedures to resolve instances of interference. The protection criteria for broadcasters was developed some 25 years ago and ignores many "real world" considerations. We applaud the Commission for recognizing, in the public safety proceeding, that the existing interference protections are "too conservative" and encourage the Commission to continue to evaluate, in setting interference protection criteria, new technologies and the differences in propagation of the frequency bands. We also suggest that the Commission look to the land mobile community's interference resolution methodologies as an example of how a protected contour approach is both more efficient and less likely to result in harmful interference to incumbent stations. As it does in the land mobile arena, the Commission should rely upon frequency advisory committees (or other similar entities) to evaluate the proposed system to ensure that there is no prohibited overlap with incumbents, or if there is, that the consent of the incumbent has been obtained.

C. Band Managers.

14. ITA is pleased that the Commission recognized the importance of mentioning the LMCC's pending petition for rule making in this *NPRM*. Unfortunately, absent an amendment to the Communications Act of 1934, as amended, it appears that the 746-806 MHz band may not be available for use by the private wireless industry through the traditional spectrum allocation processes. In order to work within the Congressionally dictated framework, the Commission has sought comment on an entity called a "band manager" which will serve as a new class of licensee

who would distribute spectrum for private wireless use.

15. Section 337(a)(2) of the Communications Act of 1934, as amended, mandates that 36 MHz of the 746-806 MHz band be assigned via competitive bidding for "commercial use." "Commercial" as used in Section 337(a)(2) is not clearly defined by Congress in the Balanced Budget Act of 1997 or the accompanying legislative history. Indeed, the term is somewhat ambiguous and is subject to interpretation by the Commission. Given the proposed inclusion of the broadcast and fixed wireless services in this allocation, the Commission certainly cannot be considering defining "commercial use" as the traditional "commercial mobile radio services."

16. ITA proposes that the Commission liberally interpret "commercial use" to include the activities of the "band manager." While the "band manager" would generate revenues through their utilization of the spectrum and would most likely purchase their licenses at auction, they would not qualify as a traditional commercial mobile radio service provider as they would not be interconnected to the public switched network nor would they offer consumer-based services to a substantial portion of the public. Instead, given the appropriate regulatory framework, this new entity could serve to facilitate the provision of service to a segment of the radio community in desperate need to spectrum -- the private wireless community.

17. Sound spectrum management dictates that the Commission allocate the much needed spectrum for private wireless use because private wireless' unique ability to "share" the spectrum creates substantial efficiencies in the use of this important and finite public resource. Therefore, spectrum allocations for the private wireless industry are in the public interest as they achieve a high level of spectrum use efficiency and contribute to the overall economic and social welfare of the American public. Unfortunately, given the licensing assignment mechanism imposed by

Congress, the Commission is precluded from a direct allocation for the private wireless industry in the 746-806 MHz band.

18. During the past decade, the Commission's allocation and licensing policies have led to dramatic increases in spectrum available for commercial mobile radio services while the spectrum available for private mobile radio systems has decreased. The Commission now has the unique opportunity to reverse this trend by making a portion of the 746-806 MHz allocation available for private wireless use through the new class of licensee called a "band manager." Recognizing a "band manager" as eligible pursuant to Section 337(a)(2) and limiting participation to those entities willing to provide spectrum for private wireless use would be one small step towards satisfying Congress' directive that the Commission consider the spectrum needs of the private wireless community.

19. For the purposes of ITA's comments, we will assume that a band manager would be eligible to receive a portion of the commercial allocation. ITA has carefully considered the Commission's request for comment on its "band manager" proposal and offers the following as potential "band manager" scenarios.

20. Band Manager Option 1. The Commission could simply re-characterize the existing frequency advisory committees as "band managers" and have them assume a greater spectrum management role. The "band managers" would be responsible for administrative matters such as issuing licenses/call signs, collecting regulatory fees, and verifying construction. This approach merely enhances the nature of the tasks already performed by the frequency advisory committees. For example, the frequency advisory committees currently review applications, complete coordinations, collect the FCC filing fees, and authorize applicants to begin operation 10 days

after certification. Enhancing the role of the frequency advisory committees would ease the administrative burden of the Commission and allow the agency to allocate its scarce resources to concentrate on major spectrum policy considerations.

21. In order to implement this proposal, the Commission would have to obtain Congressional authority to allocate a portion of the 746-806 MHz band directly for private wireless use and receive authorization to devise a schedule of payment in return for use of this spectrum. If such authority were received, the Commission could then direct the "band manager" to coordinate the frequencies, assign the licenses/call signs, and collect the spectrum use fees. The band manager would not own any spectrum nor would it offer spectrum to end users. Instead, the band manager would handle the administrative and licensing processes of spectrum management on behalf of the Commission.

22. Band Manager Option 2. The "band manager" could act as a broker between a commercial provider and private wireless licensees. For instance, a commercial provider who has excess capacity could contact a "band manager" and request that the band manager facilitate the partitioning and/or disaggregation of the excess capacity to a single interested private wireless licensee or to private wireless licensees within a broad geographic area. The "band manager" would then prepare the appropriate assignment/transfer of control application, collect the necessary filing fee associated with the assignment/transfer of control application, and submit the application to the Commission for processing. Once again, the band manager would not own any spectrum. Instead, the "band manager" would be brokering the sale of spectrum from the commercial licensee to the private wireless licensee.

23. The likelihood of success of this option appears minimal. It has been our experience

thus far that there have been no instances of partitioning or disaggregating excess capacity by a commercial provider for use by the private wireless industry. Moreover, this approach would not accommodate the nationwide requirements for additional spectrum needed by the private wireless industry.

24. Band Manager Option 3. The "band manager" bids for the spectrum at auction and owns the spectrum outright. While this approach is the most closely aligned with the Commission's proposal in the Budget Act *NPRM*,⁸ there is no guarantee that any entity will be interested in acting as a "band manager" due to the potential friction as to how this new class of licensee will operate within the confines of the Commission's existing rules. Moreover, there is also the concern as to the nature of the restrictions the Commission might place on the "band managers." For example, the Commission will have to give careful consideration to concepts such as the ability of a "band manager" to sub-lease spectrum and whether such an approach is consistent with the Communications Act of 1934, as amended, before any entity would be interested in exploring the possibility of acting as a "band manager."

25. Another important consideration is the ability of the "band manager" to raise sufficient funds to participate in an auction. As the Commission in its Budget Act *NPRM* emphasized that the "band manager" would be providing service to private wireless licensees, not the general public, the ability of the band manager to raise funds is somewhat hampered. The likelihood of investors being willing to fund a project where the majority of the marketplace will remain

⁸ See In the Matter of Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, *Notice of Proposed Rule Making*, FCC 99-52, released March 25, 1999 (Budget Act *NPRM*).

untargeted is minimal. Nevertheless, given no other alternatives at this point in time, ITA strongly urges the Commission to limit the auction of a portion of the 746-806 MHz spectrum only to those entities interested in becoming "band managers" and providing spectrum for private wireless use.⁹

D. Band Plan.

26. The Commission has sought comment on the appropriate amount of spectrum to be provided for each licensee. ITA recommends that the Commission allocate no less than 12 MHz of the total 36 MHz allocation for use by the private wireless industry. While the Commission is presently restricted as to the use of the spectrum and the license assignment mechanism, it can allocate the spectrum for private wireless use through the auspices of the "band manager." The LMCC has clearly established that the private wireless industry is in dire need of spectrum and an allocation of 12 MHz of spectrum for this industry would provide *some* relief from the spectrum shortage. By no means are ITA's comments in this proceeding meant to imply that the Commission should not consider an allocation exclusively for the private wireless community as requested in the LMCC's petition for rule making. Instead, these comments suggest that an allocation of 12 MHz of spectrum in the 746-806 MHz band for use by a "band manager" who in turn distributes the spectrum for private wireless use will alleviate some of the pressing need for spectrum currently suffered by this industry. In the event the Commission is relieved of the Congressional directives dictating the use and assignment methods for this spectrum, ITA would

⁹ In order to encourage participation by "band managers" under this approach, ITA suggests that the Commission consider imposing lesser minimum bid requirements since the spectrum will not be used for consumer purposes nor will it be available to the public at large.

suggest that the Commission allocate the 12 MHz of spectrum for direct use by the private wireless industry through the traditional allocation process.

27. The Commission has already allocated 24 MHz of spectrum in the 746-806 MHz band for public safety use. It is imperative that the Commission craft a band plan that places the spectrum allocated for use by the private wireless industry immediately adjacent to the spectrum currently allocated for public safety use. Traditionally, the Commission has intermingled or co-located spectrum allocations for private wireless and public safety users. Adopting a similar approach herein serves two purposes.

28. First, this protects the public safety spectrum from harmful interference from traditional commercial providers. There have been some instances where a public safety licensee has or is experiencing interference from a commercial provider, both of whom are operating in complete compliance with the Commission's rules. While public safety use of the spectrum is extremely important, it is difficult to adjudicate this type of situation where both parties are operating within the parameters of their respective licenses. The Commission need not lay the foundation for these unfortunate interference situations to arise in this new allocation. Instead, the Commission should allocate the spectrum immediately adjacent to the public safety spectrum for use by the private wireless industry. The coordination procedures already in place between the public safety and private wireless industries will alleviate these types of interference problems. This is but one example of why it is critical that the Commission protect the public safety allocation by using allocating the spectrum for private wireless use as a buffer zone.

29. Second, co-locating public safety and private wireless users results in lower equipment costs for the public safety community. This allocation strategy allows manufacturers to design

similar lines of equipment for the two classes of users. Manufacturers then have a greater incentive to produce equipment for this particular band because they have a larger potential customer base than they would have if the two user groups were not co-located and they are able to capitalize on economies of scale that would not otherwise be available. In addition, many of the applications of the equipment are identical and having them in together in the band benefits both public safety and the private wireless community.

IV. Conclusion

30. The Congressional directives regarding the 746-806 MHz band have placed the Commission under extreme pressure to allocate this spectrum for "commercial" use via competitive bidding. To the extent possible given the limited discretion the agency has been afforded, ITA urges the Commission to carefully craft the service rules for 746-806 MHz to provide for consistency in the Commission's spectrum management policy while maintaining the public interest standard.

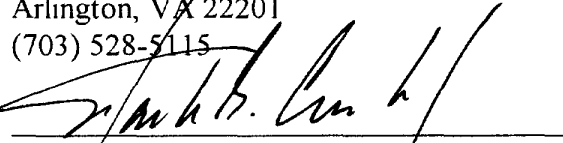
Respectfully Submitted,

Industrial Telecommunications Association

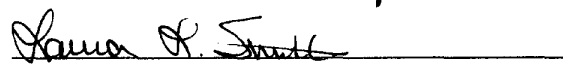
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CERTIFICATE OF SERVICE

I, Laura L. Smith, do hereby certify that on the 19th day of July 1999, I forwarded to the parties listed below a copy of the foregoing Comments of the Industrial Telecommunications Association, Inc. by first-class mail, postage pre-paid:

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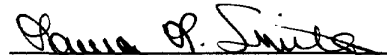
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